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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re D.V., a Person coming under the  
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

D.V.,

Defendant and Appellant.

G039151

(Super. Ct. No. DL024920)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary L. Vincent, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Sabrina Y. Lane-Erwin, Deputy Attorneys General, for Plaintiff and Respondent.

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The juvenile court found D.V. committed rape of an intoxicated person (Pen. Code, § 261, subd. (a)(3)) and declared him a ward of the court pursuant to Welfare and Institutions Code section 602. Minor challenges the sufficiency of the evidence to support the finding. For the reasons expressed below, we affirm.

## I

### FACTS AND PROCEDURAL BACKGROUND

Fifteen-year-old D.H. and her friend S.B. went to a shopping center in Orange on the afternoon of October 7, 2006. The girls met and chatted with 16-year-old minor, who worked at a cellular phone kiosk. He invited them to a party at a hotel that evening and they agreed to meet him after work. D.H. gave minor her school identification card and promised to return.

When the girls returned around 11:15 p.m., David Herrera, minor's adult supervisor, drove minor and the girls to a liquor store, where he purchased two bottles of alcohol. D.H. and minor shared half a 15-inch bottle of whiskey en route to the hotel. D.H. drank more than minor and consumed her portion within 20 minutes. She was an inexperienced drinker and never had consumed as much alcohol as she drank that night. She and minor kissed and embraced during the ride.

D.H. stumbled as she emerged from the car, but minor helped her walk to a room Herrera had rented with minor's money. D.H. informed minor before they started drinking and again as they walked to the room she "would make out with him, and . . . kiss him, but" she "didn't want to have sex."

D.H. had difficulty recalling events after she arrived at the hotel. She remembered S.B. opening the room door and entering with S.B. and minor, and recalled waking up during an argument when she heard minor exclaim, "she said it was okay for me but not for you." She testified she was lying on the bed uncovered, wearing only

underwear and a tank top, when S.B. explained to her they were fighting over a beer. D.H. admitted she may have consumed more alcohol before she passed out again.

When she awoke late the next morning, she found minor in bed next to her. Both were under the covers and she wore only a shirt. Her vaginal opening felt sore, and she noticed a puddle of blood underneath her and dried blood on her inner thighs.

She walked into the bathroom to clean herself off. S.B. followed and D.H. asked what happened. S.B. said D.H. agreed to have sex with minor and it “had gotten rough.” The girls returned to the room and watched television with minor and Juan, a youth who had arrived during the night while D.H. slept. Before they left the hotel, minor told D.H. she had been “all over him” and “kept telling him” she wanted “to have sex, and” they “went in the bathroom and . . . had sex.” S.B. told her minor had prevented Omar, another kiosk employee, and another person from raping her. About a week later, S.B. revealed to D.H. that Omar and his friend raped D.H. and minor knew about it. D.H. told her mother and reported the incident to the police.

S.B. testified minor and D.H. began kissing in the car while they waited for Herrera to purchase the liquor. At the hotel, S.B. carried a backpack containing beers while minor assisted D.H., who needed help walking from the car to the hotel room. Herrera opened the door and the three youths entered without him.

S.B. sat down to play video games. Minor and D.H. kissed and hugged on the bed. She acted “tipsy.” About 10 minutes later, minor carried D.H. into the bathroom with her legs wrapped around his waist and closed the door. While watching television, S.B. heard D.H. make sexual noises, screaming, and moaning, and later heard a loud thud as if someone fell. The shower ran for 5-10 minutes. Minor exited the bathroom with wet hair, wearing shorts. D.H. followed a few minutes later, wearing no clothes and looking as if she had just showered. She ran to minor and began kissing him and asked him to have sex. He pushed her away. She laid on the bed and called minor

over, but soon passed out. S.B. put a bra and panties on D.H. and placed the covers on her.

S.B. suggested minor accompany her to the pool. They left the lights on and propped the door open with the safety latch because they did not have a key. Unable to access the pool, they returned to find the door locked. Minor pounded on the door for several minutes but received no answer. They located Herrera in the hallway near a party going on in another room and asked him for the key. He told them to “hold on.”

While waiting in the hall, S.B. and minor drank alcohol, and minor kissed her and revealed he wanted to “get with” her. S.B. declined because he had been with her friend. Omar joined them as they continued to wait for Herrera.

Twenty minutes later, Herrera reappeared and let them into their room. They found D.H. laying on her back on top of the covers, naked and asleep. S.B. asked minor “wasn’t she covered?” and they discussed whether she had clothes on when they left the room earlier. D.H. did not move or wake up during their conversation. S.B. walked into the bathroom to change out of minor’s shorts, which she had worn to the pool. When she came out, Omar, wearing boxers and a shirt, sat in a chair drinking a beer.

Minor knelt on the bed next to D.H. He “hit on” S.B. again, stating “come on, it’s my last chance.” When S.B. declined, minor shook or nudged D.H.’s shoulder. She made a sound like “huh” or “um” with closed lips but did not move. S.B. described D.H. as “half asleep, half awake, because she was drunk.” Minor climbed into bed and began kissing D.H. under the covers. S.B. saw D.H. on top of minor and claimed the pair had sex. She described D.H. as “[j]ust laying there.” D.H. did not kiss minor, said nothing and did not move much, while minor moved “a little.”

Omar tried to kiss S.B. and undo her pants, but she rebuffed his advances. Omar sat on D.H., who was still atop minor. D.H. did not move or say anything. Minor said “what are you doing? Get off.” Omar did not move. S.B. got mad and went into the

bathroom, and Omar followed. Frightened, she made Omar leave and phoned her friend Juan to pick them up.

Minor knocked and asked to use the restroom. When he finished, S.B. said “let’s go out.” Minor replied “I don’t think you want to.” She asked why. He hesitated, and then said “they’re raping her.” She asked “why are you letting this happen” and walked out. Minor followed. Herrera was on top of D.H., who was unconscious, naked, and lying on her stomach with her legs partially off the bed. Omar knelt on the opposite side of the bed and watched. Minor told David “that’s enough. Get off her” or “it’s time to get off. Get out” and “call it a night.” Herrera got up and buttoned his pants, and left the room with Omar. D.H. did not wake up or move. S.B. laid on the bed next to D.H., tried to put a bra on her, and began to cry. Minor apologized and asked her not to cry.

Herrera and Omar returned a few minutes later. S.B. covered D.H. with a blanket. Herrera apologized and said they “were just here to have a good time and all this wasn’t supposed to happen.” Minor accused Herrera of raping D.H. David countered minor “did it, too,” and minor replied he had permission. During the argument, D.H. awoke and asked what was happening. S.B. told her “nothing, just go back to sleep.” D.H. passed out again.

S.B. told Herrera and Omar to leave. Juan arrived around 4:00 a.m., just as Herrera and Omar departed.

After telling him what happened, S.B. leaned against Juan and cried. They could not leave because Juan came in a taxi and they had to wait for his friend to pick them up later that morning. She and Juan laid on the floor with a sheet and let minor and D.H. have the bed.

According to S.B., about five or 10 minutes after she and Juan moved to the floor, D.H. awoke and she and minor had sex. D.H. sat upright on top of minor and made noises. S.B. told her to quiet down but D.H. did not respond. S.B. and Juan kissed and began having sex.

The youths arose around 10:00 a.m. While D.H. was in the restroom, minor showed S.B. the blood on the bed. S.B. rushed to the bathroom, but D.H. seemed fine. D.H. asked whether she had sex with minor, and remarked on her soreness, “thinking [minor] had sex with her too much.”

S.B. and minor agreed to withhold the complete story from D.H. After they got home, D.H. asked S.B. how many times she had sex with minor. S.B. told D.H. minor prevented the other men from raping her. The girls returned to the kiosk the next day and D.H. thanked minor. About a week after the incident, S.B. revealed to D.H. what actually happened that evening. The parties stipulated DNA testing revealed minor’s sperm on D.H.’s underwear.

Following a jurisdictional hearing in August 2007, the juvenile court found minor committed rape of an intoxicated person. Noting the amount of alcohol D.H. consumed in a short period, the court concluded she had been intoxicated, which prevented her from resisting sexual activity and “unable to control her own future and fortunes.” The court also reasoned D.H.’s statements she would not have sex with minor, followed by heavy drinking, demonstrated a reasonable person would not believe D.H. had the legal capacity to consent to sexual intercourse. The court committed minor to a juvenile facility for 120 days, less 71 days previously served, along with other terms and conditions.

## II

### DISCUSSION

#### *Substantial Evidence Supports the Juvenile Court’s Finding Minor Committed Rape of an Intoxicated Person*

Minor challenges the sufficiency of the evidence, arguing the prosecution failed to establish the effects of alcohol prevented D.H. from resisting minor’s advances, or that he knew or reasonably should have known that her intoxicated condition prevented her from consenting to sex. We disagree.

The substantial evidence rule governs our review of a challenge to the sufficiency of the evidence supporting the juvenile court's finding minor committed the offense named in the petition. (*In re Andrew I.* (1991) 230 Cal.App.3d 572, 577 (*Andrew*)). The test is whether substantial evidence supports the trier of fact's conclusion, not whether the evidence proves guilt beyond a reasonable doubt. We review the entire record in the light most favorable to the order “to determine whether it discloses substantial evidence — that is, evidence which is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the minor guilty beyond a reasonable doubt.” (*Ibid.*)

A reviewing court may sustain a conviction or finding based on the uncorroborated testimony of a single witness. (*People v. Gammage* (1992) 2 Cal.4th 693, 700.) If a trier of fact has believed the testimony of a witness, a reviewing court “cannot substitute its evaluation of the credibility of the witness unless there is either a physical impossibility that the testimony is true or that the falsity is apparent without resorting to inferences or deductions.” (*Andrew, supra*, 230 Cal.App.3d at p. 578.) The fact the circumstances could be reconciled with a contrary finding does not warrant reversal of the judgment. (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.) Consequently, an appellant “bears an enormous burden” when challenging the sufficiency of the evidence. (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330.)

Penal Code section 261 provides “(a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: [¶] . . . [¶] (3) Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused.” To prove a violation of Penal Code section 261, subdivision (a)(3), the prosecution must prove the following: (1) minor had sexual intercourse with D.H.; (2) they were not married when the act occurred; (3) the effect of the intoxicating substance prevented D.H. from resisting; and

(4) minor knew or should have known the effect of the intoxicating substance prevented D.H. from resisting. (See CALCRIM No. 1002.)

The section “proscribes sexual intercourse with a person who is not capable of giving legal consent because of intoxication. . . . [T]he issue is not whether the victim actually consented to sexual intercourse, but whether he or she was capable of exercising the degree of judgment a person must have in order to give legally cognizable consent.” (*People v. Giardino* (2000) 82 Cal.App.4th 454, 462 (*Giardino*).) The trier of fact must determine “whether, as a result of her level of intoxication, the victim lacked the legal capacity to give ‘consent’ as that term is defined in section 261.6.<sup>[1]</sup> Legal capacity is the ability to exercise reasonable judgment, i.e., to understand and weigh not only the physical nature of the act, but also its moral character and probable consequences.” (*Id.* at p. 466.)

In deciding whether the level of the victim’s intoxication deprived the victim of legal capacity, the trier of fact must “consider all the circumstances, including the victim’s age and maturity. [Citation.] It is not enough that the victim was intoxicated to some degree, or that the intoxication reduced the victim’s sexual inhibitions. ‘Impaired mentality may exist and yet the individual may be able to exercise reasonable judgment with respect to the particular matter presented to his or her mind.’ [Citation.] Instead, the level of intoxication and the resulting mental impairment must have been so great that the victim could no longer exercise reasonable judgment concerning that issue.” (*Giardino, supra*, 82 Cal.App.4th at pp. 466-467.)

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<sup>1</sup> Penal Code section 261.6 provides: “In prosecutions under Section[s] 261, 262, 286, 288a, or 289, in which consent is at issue, ‘consent’ shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved. [¶] A current or previous dating or marital relationship shall not be sufficient to constitute consent where consent is at issue in a prosecution under Section[s] 261, 262, 286, 288a, or 289. [¶] Nothing in this section shall affect the admissibility of evidence or the burden of proof on the issue of consent.”



Substantial evidence supported the juvenile court's finding minor committed the alleged offense. D.H. testified she quickly drank more than a quarter of a large bottle of whiskey en route to the hotel. While sober, she told minor she did not want to have sex with him. Feeling the effects of alcohol when they arrived at the hotel, she stumbled as she exited Herrera's car and minor had to assist her to the room. She had almost no recall of events after she arrived at the hotel. Most significantly, she passed out shortly after exiting the bathroom. Minor observed D.H. consumed a substantial amount of whiskey and knew the alcohol had rendered her incapable of walking without assistance. While circumstances might be reconciled with a contrary finding, the juvenile court could reasonably conclude D.H.'s conduct before and just after leaving the bathroom did not undermine a finding she had been incapable of resisting minor's advances and exercising reasonable judgment about engaging in sexual intercourse.

Even if we put aside minor's initial sexual encounter with D.H., S.B. testified minor and D.H. had sex on two occasions *after* they left the bathroom. The second occasion alone amply demonstrates D.H.'s intoxication prevented her from consenting to sexual intercourse with minor or resisting his efforts to seduce her. Returning from the pool, minor and S.B. pounded on the door to the hotel room, but D.H. did not respond. Over 20 minutes later, minor and S.B. gained entry when Herrera opened the door with his room key. D.H. did not respond when they entered the room, continuing to sleep while lying naked on top of the covers. After S.B. rebuffed minor's sexual advances, he turned his sights to D.H. and attempted to shake her out of her stupor. S.B. described D.H. as "half asleep, half awake, because she was drunk." Minor kissed and embraced D.H. under the covers. S.B. testified she observed D.H. on top of minor having sex. These facts provide substantial evidence supporting the juvenile court's finding minor was too intoxicated to consent to intercourse or resist minor's overtures, and minor knew or reasonably should have known D.H. was too intoxicated to resist.

Minor argues S.B.'s testimony does not constitute substantial evidence he and D.H. had sexual intercourse during this second incident. True, minor's cross-examination weakened her earlier claim that she observed minor and D.H. having sexual intercourse on the bed. She admitted she did not pay close attention to the couple and they did not make any noises or movements that led her to conclude they were having sex. But S.B. never wavered D.H. was on top of minor while embracing under the covers, and earlier S.B. testified she observed minor moving "a little" while laying underneath D.H. The juvenile court could reasonably conclude minor intended to have sex with D.H. because he immediately turned his attention to her after S.B. rebuffed his sexual overtures. Minor shook D.H., asleep and lying naked on the bed, and began kissing and embracing her, with D.H. getting on top of him. The court reasonably could conclude minor had sex with D.H. while S.B.'s attention was diverted. The puddle of blood D.H. discovered in the morning, and the dried blood on her leg supports the court's conclusion.

Minor contends that even if substantial evidence supported the inference minor and D.H. "engaged in sex . . . shortly after [she] ran out of the bathroom, it was clear . . . that [she] had the capacity to legally consent to the act, but also that she was the individual who actually initiated the sexual contact on that occasion." Not so. The evidence demonstrated the second incident occurred approximately 30 minutes after D.H. passed out, and minor had to shake her shoulders to wake her. D.H. did not initiate this second encounter.

Minor does not directly address S.B.'s uncontradicted testimony he had intercourse with D.H. after Juan's arrival. The evidence demonstrated D.H. passed out after having sex with minor a second time and remained unconscious when Herrera later sexually assaulted her. She awoke briefly while minor argued with Herrera, but again passed out. Based on this evidence, the court reasonably could conclude D.H. remained intoxicated and therefore incapable of consenting to sex with minor on the third occasion.

Thus, substantial evidence shows minor had sex with D.H. on this third occasion while she was barely conscious, and minor knew she was grossly intoxicated and had been that way throughout the evening. We therefore conclude substantial evidence supports the juvenile court's finding.

### III

#### DISPOSITION

Judgment affirmed.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.